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No. 82-862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, where the primary objective of the employer's Federal financial assistance is unrelated to employment.

2. Whether a handicapped applicant for employment who cannot demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance may nevertheless maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794.

3. Whether a private right of action exists under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794.

A complete list of the parties to the proceeding in the court below is contained in the caption of the case in this Court. A listing of all subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner Consolidated Rail Corporation has been included within the Petition for a Writ of Certiorari, at ii.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	v
Citations of Opinions Below	xviii
Jurisdiction	xix
Statutory Provisions Involved	xix
Statement of the Case	1
Summary of Argument	2
Argument	4
I. THE REHABILITATION ACT OF 1973, AS AMENDED, DOES NOT PERMIT THE MAINTENANCE OF EMPLOYMENT DISCRIMINATION ACTIONS WHERE THE PRIMARY OBJECTIVE OF THE FEDERAL FINANCIAL ASSISTANCE IS UNRELATED TO EMPLOYMENT	4
A. The Plain Language of the Rehabilitation Act Contains an Express Limitation Upon Employment Discrimination Actions	5
B. The Legislative History of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964 Demonstrates that Congress Intended to Limit Actions Alleging Employment Discrimination Under Those Acts	11
1. Congress intended Title VI to apply to employment discrimination only where the primary objective of federal funding was to provide employment	11
2. Congress intended the limitations of Title VI to apply to actions under Section 504 of the Rehabilitation Act	14

II. THE FAILURE OF THE THIRD CIRCUIT TO REQUIRE A NEXUS BETWEEN A SPECIFIC PROGRAM SUPPORTED BY FEDERAL FINANCIAL ASSISTANCE AND THE DENIAL OF EMPLOYMENT VIOLATED THE "PROGRAM-SPECIFIC" NATURE OF SECTION 504 24

A. The Language of the Rehabilitation Act is Program-Specific 24

B. The Third Circuit's Adoption of an "Institutional" Approach to Section 504 Cannot be Reconciled with the Program-Specific Nature of the Statute 26

1. The legislative history of Section 504 and Title VI evidences Congressional intent to utilize a "programmatic," rather than "institutional" approach 27

2. The "institutional" approach implicitly applied by the court below under Grove City is inconsistent with the "program-specific" nature of Section 504 28

III. RESPONDENT LESTRANGE DOES NOT HAVE A PRIVATE CAUSE OF ACTION UNDER SECTION 504 30

A. In the Present Procedural Context, Respondent LeStrange Can Seek Only Monetary Relief 31

B. There Is No Private Cause of Action Under Section 504 of the Rehabilitation Act for Damages or Injunctive Relief 32

1. There is no basis in the statute or its legislative history for an implied cause of action to enforce Section 504 33

a. Section 505 of the Rehabilitation Act expressly identifies the remedies which are available under Section 504 of the Act, and fails to provide for a private cause of action 34

b. The legislative history of the Rehabilitation Act and its subsequent Amendments do not evidence an intent to create a private cause of action 36

2. An implied private remedy under Section 504 would frustrate the purposes of the Rehabilitation Act 39

C. If a Private Cause of Action Exists Under Section 504, It is Limited to Injunctive Relief 40

Conclusion 48

TABLE OF AUTHORITIES

Cases: Page

Afro-American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974) . . . . . 18 n. 14

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . . . . . 41 n. 35, 44, 45

Ashcroft v. Mattis, 431 U.S. 171 (1977) . . . . . 32 n. 23

Association Against Discrimination in Employment, Inc. v. Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) 14

Bell v. Hood, 327 U.S. 678 (1946) . . . . . 43, 43 n. 40

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 5

Bossier Parish School Bd v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) . 35

Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 34

Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979) . . . . . 41 n. 36, 42, 43, 46

Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) . . . 28

Calhoun v. Ill. State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982) . . . . . 41 n. 36, 47

California v. Sierra Club, 451 U.S. 287 (1981) . . 33

Camenisch v. University of Tex., 616 F.2d 127 (5th Cir. 1980), *vacated*, 451 U.S. 390 (1981) . . . 21, 33 n. 24, 41 n. 36

Campbell v. Talladega Cty Bd of Educ., 518 F. Supp. 47 (N.D. Ala. 1981) . . . . . 41 n. 36, 47

Cases: Page

Cannon v. University of Chic., 406 F. Supp. 1257 (N.D. Ill.), *aff'd*, 559 F.2d 1063 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979) ..... 35 n. 27, 38 n. 33, 40, 42 n. 39, 43 n. 40, 45

Carlson v. Green, 446 U.S. 14 (1980) ... 31, 31 n. 23, 43 n. 40

Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980) 7

Carter v. Independent School Dist. No. 6, 550 F. Supp. 172 (W.D. Okla. 1981) ..... 41 n. 36

Chambers v. Omaha Public School Dist., 536 F.2d 222 (8th Cir. 1976) ..... 42 n. 37

Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976) ..... 20 n. 16

Cohen v. United States, 366 F.2d 363 (9th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967) 35 n. 26

Community Television of S. Cal. v. Gottfried, 51 U.S.L.W. 4134 (U.S. Feb. 22, 1983) (No. 81-298) 10

Concerned Tenants Ass'n. of Indian Trails Apts. v. Indian Trails Apts., 496 F. Supp. 522 (N.D. Ill. 1980) ..... 42 n. 37

Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 23

Cort v. Ash, 422 U.S. 66 (1975) ..... 33, 33 n. 25

Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) ..... 21 n. 17, 32-33

Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982) ..... 41 n. 36

Cases: Page

Davis v. Modine Mfg. Co., 526 F. Supp. 943 (D. Kan. 1981) ..... 7 n. 4

Davis v. Passman, 442 U.S. 228 (1979) ..... 40-41, 43 n. 40

Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979) ..... 33 n. 24

De Funis v. Odegaard, 416 U.S. 312 (1974) 31

Drayden v. Needville Indep. School Dist., 642 F.2d 129 (5th Cir. 1981) ..... 42 n. 37, 45

Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) ..... 21 n. 17

Feliciano v. Romney, 363 F. Supp. 656 (S.D.N.Y. 1973) 18

Fells v. Brooks, 522 F. Supp. 30 (D.D.C. 1981) .. 37

Fisher v. Tucson, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 178 (1982) ..... 36 n. 28

Flanagan v. Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) ..... 42 n. 37

Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981) 23

Garrity v. Gallen, 522 F. Supp. 171 (D.N.H. 1981) 37

Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) ..... 14 n. 10

Gee v. CBS, Inc., 471 F. Supp. 600 (E.D. Pa.), *aff'd mem.*, 612 F.2d 572 (3d Cir. 1979) ..... 32 n. 23

Gelman v. Department of Educ., 544 F. Supp. 651 (D. Colo. 1982) ..... 41 n. 36, 45 n. 41, 47

Cases: Page

Gilliam v. Omaha, 388 F. Supp. 842 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975) ... 42 n. 37, 45 n. 41

Gregg v. Board of Educ., 535 F. Supp. 1333 (E.D.N.Y. 1982) ..... 41 n. 36

Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-792) 26, 29, 30

Guardians Ass'n. of N.Y.C. Police Dept., Inc. v. Civil Serv. Comm'n., 633 F.2d 232 (2nd Cir. 1980), *cert. granted*, 454 U.S. 1140 (*argued* Nov. 1, 1982) (No. 81-43) ..... 32, 41 n. 35, 42, 42 n. 37, 43, 45, 46

Guertin v. Hackerman, 496 F. Supp. 593 (S.D. Tex. 1980) ..... 7 n. 4

Hardy v. Leonard, 377 F. Supp. 831 (N.D. Cal. 1974) ..... 14 n. 10, 18 n. 14

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) 20

Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979) ..... 7 n. 4

Hoffman v. Ohio Youth Comm'n., 13 Fair Empl. Prac. Cas. (BNA) 30 (N.D. Ohio 1975), *aff'd mem.*, 547 F.2d 1167 (6th Cir. 1977) 31

Hutchings v. Erie City & Cty. Bd. of Dir., 516 F. Supp. 1265 (W.D. Pa. 1981) ...41 n. 36, 42 n. 38, 43, 44, 45 n. 41, 47

Jones v. Metropolitan Atlanta Rapid Transit Authority (MARTA), 681 F.2d 1376 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3535 (U.S. Jan. 11, 1983) (No. 82-1159) .. 7 n. 4, 33 n. 24

Cases: Page

Kling v. Los Angeles, 633 F.2d 876 (9th Cir. 1980) . . . . . 33 n. 24

Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) 37

Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) 33 n. 24

LeStrange v. Consolidated Rail Corporation, 501 F. Supp. 964 (M.D. Pa. 1980) xviii

LeStrange v. Consolidated Rail Corporation, No. 78-0944 (M.D. Pa. November 4, 1980) . . . xviii, 2

LeStrange v. Consolidated Rail Corporation, 687 F.2d 767 (3d Cir. 1982) . . . xviii, 2, 7, 13, 16 n. 12, 16 n. 13, 20, 26, 42 n. 38

Lieberman v. University of Chic., 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982) . . . . . 42 n. 39, 45, 46

Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) . . . . . 32, 33 n. 24, 36

Lorillard Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978) 18

Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974) 32 n. 23

Merrill Lynch Pierce Fenner & Smith, Inc., v. Curran, 50 U.S.L.W. 4457 (U.S. May 3, 1982) (No. 80-203) 33

Meyerson v. State, 507 F. Supp. 859 (D. Ariz. 1981) 6

Middlesex Cty Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1 (1981) 33

Miener v. State, 498 F. Supp. 944 (E.D. Mo. 1980), *rev'd*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S.Ct. 215 (1982) . 40 n. 34, 41 n. 36, 42, 43, 44, 46

Cases: Page

Moxley v. Vernot, 555 F. Supp. 554 (S.D. Ohio 1982) ..... 7 n. 4

National Ass'n for the Advancement of Colored People (NAACP) v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979) ..... 31, 33 n. 24, 35

National RR Passenger Corp. v. National Ass'n. of RR Passengers, 414 U.S. 453 (1974) 34, 38

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) 33

North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 102 S.Ct. 1912 (1982) ..... 3, 7, 8, 8 n. 6, 24, 25, 26, 27, 29

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 40

Ortiz v. Bach, 14 Fair Empl. Prac. Cas. (BNA) 1019 (D. Col. 1977) ..... 18 n. 14

Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980) ..... 32, 40 n. 34, 41 n. 36, 43, 44

Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) 14, 16, 17, 19

Poole v. South Plainfield Bd of Educ., 490 F. Supp. 948 (D.N.J. 1980) ..... 41 n. 36

Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983) ..... 41 n. 36

Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981) ..... 33 n. 24, 41 n. 36, 42

Rendon v. Utah State Dept. of Employment Sec. Job Serv., 454 F. Supp. 534 (D. Utah 1978) 42 n. 37, 46, 47

Cases: Page

Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) 29

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980) ... 23, 36 n. 28, 38 n. 32, 38 n. 33

Rosado v. Wyman, 397 U.S. 397 (1970) 17

Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982) ...32, 40-41 n. 35, 41 n. 36, 43, 44, 46, 47

Sabol v. Board of Educ., 510 F. Supp. 892 (D.N.J. 1981) ..... 7 n. 4

Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982) 6

Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) 28, 30

Southeastern Community College v. Davis, 442 U.S. 397 (1979) ..... 22, 31, 37 n. 29

Sumpter v. Harper, 683 F.2d 106 (4th Cir. 1982) ..... 42 n. 37, 47

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 23-24, 33, 34, 40

Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) ..... 7, 22, 23 n. 20

Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979) 33, 34, 38, 40, 43, 44

Union Carbide Corp. v. Borg-Warner Corp., 550 F.2d 355 (6th Cir. 1977) ..... 35 n. 26

Cases: Page

United Handicapped Fed'n. v. Andre, 558 F.2d 413 (8th Cir. 1977) ..... 33 n. 24

United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981) 6-7

United States v. Jefferson Cty Bd of Educ., 372 F.2d 836 (1966), *cert. denied*, 389 U.S. 840 (1967) 13, 18

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 32

Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981) 33

University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) 29

University of Texas v. Camenisch, 451 U.S. 390 (1981) 21

Valentine v. Smith, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) 14

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 24

FEDERAL STATUTORY PROVISIONS

Education of All Handicapped Children Act of 1973 (EAHCA), 20 U.S.C. §§1401-1461, 1415(e)(2) 44

The Education Amendments of 1972, 20 U.S.C. §§1681-1686. ..... *passim*

§901, 20 U.S.C. §1681 ..... 3, 7, 7 n. 5, 25

§902, 20 U.S.C. §1682 ..... 14, 25

§903, 20 U.S.C. §1683 ..... 14, 36

28 U.S.C. §1254(1) (1948) xix

Statutes: Page

The Rehabilitation Act of 1973, as amended, 29 U.S.C. §§701-794 ..... *passim*

29 U.S.C. §701 ..... 39, 46

29 U.S.C. §§720-750 4

29 U.S.C. §§760-763 4

29 U.S.C. §771 4

§501, 29 U.S.C. §791 .....4, 10, 10 n. 8, 16; Att. B

§503, 29 U.S.C. §793 .....4, 10, 10 n. 8, 16; Att. C

§504, 29 U.S.C. §794 ..... *passim*

§505, 29 U.S.C. §794a ..... *passim*

1974 Amendments to the Rehabilitation Act, Pub. L. 93-516, 88 Stat. 1619, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373 . *passim*

Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312 ..... *passim*

Comprehensive Employment Training Act, 29 U.S.C. §§841-991 (1973) .....21 n. 17

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1981 .....38 n. 33

42 U.S.C. §1983 .....37 n. 29

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-2000d-6 ..... *passim*; Att. A

§601, 42 U.S.C. §2000d .....*passim*; Att-1

§602, 42 U.S.C. §2000d-1 .....*passim*; Att-1

Statutes: Page

§603, 42 U.S.C. §2000d-2. . . . . *passim*; Att-2

§604, 42 U.S.C. §2000d-3 . . . . . *passim*; Att-2

Title VII of The Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17 . . . . . *passim*

42 U.S.C. §2000e-5(a). 44

Regional Rail Reorganization Act of 1973 (3R Act), 45 U.S.C. §§701-797 m. 1

§216, 45 U.S.C. §726 . . . . . 1, 26, 26 n. 21

Title V, 45 U.S.C. §§771-780 . . . . . 1, 26 n. 21

Title VII, 45 U.S.C. §797a 1

Northeast Rail Services Act of 1981 (NERSA), 45 U.S.C. §§1101-1116 1

STATE STATUTORY AUTHORITIES

20 PA. CONS. STAT. ANN., §3371 (Purdon 1972) . . . . . 31-32 n. 23

REGULATIONS

28 C.F.R. Part 41 (1982) . . . . . 22 n. 19, 39

45 C.F.R. §80.3(c) 18, 21

45 C.F.R. Part 84 (1977) . . . . . 20 n. 16

45 C.F.R. §84.11 22

45 C.F.R. §84.11(a)(1) 21

45 C.F.R. Part 84, App. A., p. 293, no. 8 (1982) 32

45 C.F.R. Part 85 (1977-78) . . . . . 22 n. 18, 22 n. 19

Regulations: Page

49 C.F.R. Part 27 (1981) . . . . . 22 n. 18, 39

49 C.F.R. §27.11 39

49 C.F.R. §27.126 39

49 C.F.R. §27.31 . . . . . 22 n. 18

41 Fed Reg. 17871 (Apr. 29, 1976) . . . . . 20 n. 16

41 Fed. Reg. 20296 (May 17, 1976) . . . . . 20 n. 16

41 Fed. Reg. 29548 (July 16, 1976) . . . . . 20 n. 16

42 Fed. Reg. 22676 (May 4, 1977) . . . . . 20 n. 16

42 Fed. Reg. 22688 (May 4, 1977) 20

43 Fed. Reg. 2132 (Jan. 13, 1978) . . . . . 22 n. 18

44 Fed. Reg. 31468 (May 31, 1979) 22 n.18

45 Fed. Reg. 72995 (Nov. 4, 1980) . . . . . 22 n. 19

46 Fed. Reg. 40686-87 (Aug. 11, 1981) . . . . . 22 n. 19

MISCELLANEOUS CONGRESSIONAL MATERIALS
UNITED STATES SENATE

S. Rep. No. 316, 96th Cong., 1st. Sess. (1979) 19 n. 15, 22, 38 n. 33, 44

S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076 4, 15, 15 n. 11, 27, 27 n. 22

S. Rep. No. 890, 95th Cong., 2nd Sess. (1978) 20, 37 n. 31

S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 32281 (1972) 15, 16, 27

S. Rep. No. 1297, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373 . . . . . 17, 18, 20 n. 16, 27, 27 n. 22, 36

Congressional Materials: Page

HOUSE OF REPRESENTATIVES

H.R. 7248, 92d Cong., 1st Sess. (1971) 8

H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. Code. Cong. & Ad. News 7312 ..... 37 n. 31

H.R. Conf. Rep. No. 1581, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 35141 15

CONGRESSIONAL RECORD

110 Cong. Rec. 1520-21 (1964) (Rep. Celler) .. 11, 12

110 Cong. Rec. 1542 (1964) 27

110 Cong. Rec. 1622-23 (1964) (Rep. Celler) .. 30

110 Cong. Rec. 2484 (1964) (Rep. Rodino) ... 11-12

110 Cong. Rec. 5253 (Sen. Humphrey) 27, 30

110 Cong. Rec. 5422 (1964) 27

110 Cong. Rec. 7059 (1964) (Sen. Pastore) ... 30

110 Cong. Rec. 7060 (1964) (Sen.Pastore) 12

110 Cong. Rec. 10076 (1964) (Attorney General Kennedy) 12

110 Cong. Rec. 12676 (1964) (Sen. Allott) 30

110 Cong. Rec. 12820 (1964) (Sen. Humphrey) 12

118 Cong. Rec. 11788 (1972) ..... 19 n. 15

118 Cong. Rec. 24684 n.1 (1972) (Sen. Bayh) . 8

118 Cong. Rec. 32281 (1973) 15, 16, 27

118 Cong. Rec. 35141 (1973) 15

119 Cong. Rec. 5882 (1973) (Sen. Cranston) .. 16 n. 13

Congressional Materials: Page

119 Cong. Rec. 5887 (1973) (Sen. Javits) . . . . . 16 n. 13

119 Cong. Rec. 5893 (1973) (Sen. Taft) . . . . . 16 n. 12

120 Cong. Rec. 30551 (1974) (Sen. Stafford) 18

EXECUTIVE ORDERS

Exec. Order No. 11914 (April 28, 1976), 41 Fed. Reg. 17871 (April 29, 1976) . . . . . 20 n. 16

Exec. Order No. 12250 (Nov. 2, 1980, 45 Fed. Reg. 72995 (Nov. 4, 1980) . . . . . 22 n. 19

MISCELLANEOUS

Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L. J.1, 36, 38 (1981) . . . 9, 39

Comment, Compensating the Handicapped: An Approach to Determining the Appropriateness of Damages for Violations of Section 504, 1981 B.Y.U.L. REV. 133 . . . . . 40 n. 34

American Heritage Dictionary of the English Language (1980) . . . . . 35 n. 26

J. Hurst, *Dealing with Statutes* (1982) 34

Letter of Assistant Attorney Reynolds to Clarence Pendleton, Jr., September 16, 1982, *as reprinted in* Appendix to Petition for Certiorari in *Grove City v. Bell*, No. 82-792 (Nov. 9, 1982) (A. 135-36) 29-30

Rules of the Supreme Court, R. 21.1(a) 31

No. 82-862

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CONSOLIDATED RAIL CORPORATION,
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LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

CITATIONS OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 687 F.2d 767 (3d Cir. 1982) and is included within the Joint Appendix, commencing at page A-32. The Opinion and Order of the United States District Court for the Middle District of Pennsylvania, No. 78-0944 on November 4, 1980, have not been reported and appear in the Appendix to the Petition for a Writ of Certiorari, commencing at page A-25. A prior Opinion and Order of the United States District Court for the Middle District of Pennsylvania are reproduced at page A-53 of the Appendix to the Petition for a Writ of Certiorari and are reported at 501 F. Supp. 964 (M.D. Pa. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1982. The Petition for a Writ of Certiorari was filed on November 22, 1982 and was granted on February 22, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §794, as amended Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

> Nondiscrimination under federal grants and programs; promulgation of rules and regulations.
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. §794a, Pub.L. 93-112, Title V, §505, as added Pub.L 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 1982:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor, or other appropriate relief, in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252:

Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d-3, Pub.L. 88-352, Title VI, §604, July 2, 1964, 78 Stat. 253:

Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment.

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

20 U.S.C. §1681, Pub.L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373:

Sex

Prohibition against discrimination; exceptions. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

STATEMENT OF THE CASE

This is an action alleging handicap discrimination in employment in which the Court of Appeals held that the mere receipt of Federal financial assistance by Petitioner Consolidated Rail Corporation ("Conrail"), regardless of the nature, purpose or beneficiaries of such assistance, was sufficient to enable a handicapped applicant for employment to maintain a cause of action under Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, 29 U.S.C. §794 ("Section 504").

This action was commenced on September 22, 1978 by Respondent Thomas LeStrange, who alleged that Petitioner Conrail failed to employ him as a locomotive engineer by reason of his physical handicap, *i.e.*, the amputation of his left hand and a portion of his left forearm. The jurisdiction of the District Court was invoked under, *inter alia*, Section 504.

There is no dispute in the instant matter that Conrail has received federal funding through the purchase of securities pursuant to Section 216 of the Regional Rail Reorganization Act of 1973 ("3R Act"), 45 U.S.C. §726. In addition, Conrail has received federal funding through reimbursement for employee protective benefits authorized by Title V of the 3R Act, 45 U.S.C. §§771-780, prior to its repeal by the Northeast Rail Services Act of 1981, 45 U.S.C. §§1101-1116, and currently by Title VII of the 3R Act, 45 U.S.C. §797a, as amended.

Conrail filed a Motion for Summary Judgment on September 10, 1981 on the ground that LeStrange lacked standing to raise a claim for violation of Section 504. On October 20, 1981, Judge Rambo granted Conrail's Motion for Summary Judgment, holding that LeStrange could not demonstrate standing to sue under Section 504 because: (1) Conrail did not receive federal funding with a primary objective of providing employment; (2) LeStrange was not an intended beneficiary of the Federal financial assistance to Conrail; and (3) any alleged discrimination in the failure to employ

LeStrange did not cause discrimination against the primary beneficiaries of federal aid. (Pet.App. at A-25 through A-46).[1]

LeStrange appealed Judge Rambo's decision to the United States Court of Appeals for the Third Circuit. The Court of Appeals reversed the district court and remanded the case for further consideration and disposition on the merits. The court concluded that Section 504 prohibited employment discrimination on the basis of handicap by federal grantees, regardless of the nature, purpose or intended beneficiaries of the Federal financial assistance, and that such a prohibition could be enforced by means of a private cause of action. (Jt.App. at A-32 through A-54).

SUMMARY OF ARGUMENT

The decision below, creating a private right of action for handicap discrimination in employment against all federal grantees, has displaced a contrary Congressional policy judgment, set forth in the express language and legislative history of the Rehabilitation Act of 1973. This judgment must be left to Congress, which has not evinced any intention to create such a broad cause of action.

I. Section 504 of the Rehabilitation Act, in language virtually identical to that contained in Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, prohibits discrimination against qualified handicapped individuals under any program or activity receiving Federal financial assistance. The enforcement provisions of Section 504, set forth in Section 505(a) of the Act, as amended, expressly incorporate the "remedies, procedures and rights" set forth in Title VI into the Rehabilitation Act. Included among the "remedies, procedures and rights" set forth in Title VI is the specific limitation contained in Section 604, 42 U.S.C. §2000d-3, prohibiting agency or department action under Title VI

1. Appendix to Petition for a Writ of Certiorari, hereinafter "Pet.App.". The Joint Appendix shall be referred to as "Jt. App."

unless a primary objective of the federal funding is to provide employment. Section 604 was included within Title VI to manifest the clear Congressional intent that any enforcement activity regarding employment practices be related to the purpose of the federal funding, in order to avoid funding termination of programs in which no discrimination occurred. As incorporated within the Rehabilitation Act, Section 604 similarly operates as a clear limitation on employment discrimination actions under Section 504.

II. In finding that LeStrange could maintain an employment discrimination action on the basis of handicap without regard to the nature, purpose or beneficiaries of the Federal financial assistance, the Court of Appeals failed to consider whether LeStrange encountered the alleged discrimination as a participant in, or beneficiary of, a specific program supported by federal funding. In so doing, the Court of Appeals ignored this Court's explicit admonition in *North Haven* that any enforcement activity under Section 901 of Title IX of the Education Amendments of 1972 must have a "program-specific" focus. In light of the identical language utilized in Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act, as well as the legislative history of those statutes, this proceeding cannot be maintained without a showing of a nexus between a specific federally funded program and the denial of employment to LeStrange.

III. The Rehabilitation Act does not establish an express cause of action for the private enforcement of Section 504. Indeed, the language and legislative history of the statute demonstrates that a private cause of action should not be implied. Section 505 of the Rehabilitation Act adopts the "remedies, procedures and rights set forth in Title VI." No private cause of action is set forth in Title VI; the Rehabilitation Act should not be expanded to create a remedy which was not included by Congress. If a private cause of action is found to exist under Section 504, it should be limited solely to injunc-

tive relief. Neither the wording of Section 504, nor its legislative history, provide any indication that Congress intended that the anti-discrimination provision could be enforced through private lawsuits for monetary relief. In the absence of any evidence of Congressional intent to create an action for damages, the federal courts should hesitate to create a legal entitlement to a monetary remedy.

ARGUMENT

I. THE REHABILITATION ACT OF 1973, AS AMENDED, DOES NOT PERMIT THE MAINTENANCE OF EMPLOYMENT DISCRIMINATION ACTIONS WHERE THE PRIMARY OBJECTIVE OF THE FEDERAL FINANCIAL ASSISTANCE IS UNRELATED TO EMPLOYMENT

The Rehabilitation Act of 1973 was enacted to provide comprehensive federal programs of assistance for the training and rehabilitation of handicapped individuals. *See* S. Rep. No. 318, 93d. Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076. Among the programs authorized by the Rehabilitation Act were the provision of federal grants for State rehabilitation plans, 29 U.S.C. §§720-750, for research and training projects, 29 U.S.C. §§760-763, and for the construction of rehabilitation facilities, 29 U.S.C. §771. In addition, under the Subchapter V heading of "Miscellaneous Provisions", the Rehabilitation Act established affirmative obligations for federal agencies and contractors to employ handicapped individuals, 29 U.S.C. §§791, 793, and expressed a policy against discrimination by federal grantees, 29 U.S.C. §794.

These provisions demonstrate that Congress fashioned the Rehabilitation Act in 1973 primarily as a funding statute to facilitate the provision of services to handicapped individuals. It is not focused remedial legislation providing for the judicial enforcement of specifically defined substantive rights. Assuming *arguendo*

that a private action may be maintained under Section 504,[2] what is the scope of this cause of action in light of the language of the statute, its legislative history, and decisions of the Court? Conrail contends that actions alleging handicapped discrimination in employment may be maintained only where the primary objective of the federal funding is related to employment.

A. The Plain Language of the Rehabilitation Act Contains an Express Limitation Upon Employment Discrimination Actions.

As frequently noted by the Court, "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). Section 504 of the Rehabilitation Act provides, in pertinent part:

> No otherwise qualified handicapped individual in the United States . . ., shall, solely by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program of activity receiving Federal financial assistance. . . .

29 U.S.C. §794. Because Section 504 contains no express enforcement provisions, Congress amended the Rehabilitation Act in 1978 by including a new Section 505, which provides, *inter alia*, that:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

§505(a)(2), 29 U.S.C. §794a(a)(2).

Thus, Congress intended to enforce Section 504 through the remedies, procedures and rights established by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Title VI contains a broad prohibition against ra-

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2. *See supra*, at pp. 30-47.

cial discrimination in Section 601 virtually identical to that contained in Section 504 with respect to handicap discrimination.[3] 42 U.S.C. §2000d. Title VI also authorizes administrative enforcement of that Title in Section 602, 42 U.S.C. §2000d-1, and judicial review of agency action in Section 603, 42 U.S.C. §2000d-2. More importantly for purposes of the instant matter, Title VI contains the following limitation in Section 604:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. §2000d-3.

Accordingly, the "remedies, procedures and rights" set forth in Title VI, incorporated into Section 504 by the 1978 Amendments to the Rehabilitation Act, include the express limitation upon employment discrimination actions established by Section 604 of Title VI. This limitation is applicable, therefore, to actions commenced under Section 504 of the Rehabilitation Act. Based upon this analysis:

> The great weight of authority holds that claims of employment discrimination under §504 cannot be maintained unless a primary objective of the federally funded activity or program is to provide employment.

Meyerson v. State, 507 F. Supp. 859, 863 (D. Ariz. 1981). Four Courts of Appeals have explicitly adopted this analysis: *Scanlon v. Atascadero State Hosp.*, 677 F.2d 1271 (9th Cir. 1982); *United States v. Cabrini*

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3. Section 601 of Title VI, 42 U.S.C. §2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Medical Center, 639 F.2d 908 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), as have a majority of lower courts.[4]

The Court of Appeals rejected this analysis by first adopting a presumption that the broad language of Section 504 could not be restricted by implicit limitations upon employment discrimination actions. 687 F.2d at 769-70 (Jt.App at A-37). This presumption was formed by the Third Circuit's interpretation of *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S. Ct. 1912 (1982), in which the Court examined the language of Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681,[5] and found that "[b]ecause §901(a) neither expressly nor impliedly excludes employees from its reach . . ." allegations of employment discrimination were actionable under Title IX, "unless other considerations counsel to the contrary." 102 S.Ct. at 1918.

The Court of Appeals' reliance on Section 901 of Title IX as interpreted in *North Haven* is misplaced; neither Section 901 nor *North Haven* can fairly be applied outside the context of Title IX. The Court in *North Haven* relied in large part upon an aspect of Title IX's sparse legislative history relating to the deletion of a pro-

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4. *Moxley v. Vernot*, 555 F. Supp. 554 (S.D. Ohio 1982); *Davis v. Modine Mfg Co.*, 526 F. Supp. 943 (D. Kan. 1981); *Sabol v. Bd. of Educ.*, 510 F. Supp. 892 (D.N.J. 1981); *Guertin v. Hackerman*, 496 F. Supp. 593 (S.D. Tex. 1980). *Contra Jones v. Metropolitan Atlanta Rapid Transit Auth. ("MARTA")*, 681 F.2d 1376 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3535 (U.S. Jan 11, 1983) (No. 82-1159); *Hart v. County of Alameda*, 485 F. Supp. 66 (N.D. Cal. 1979).

5. Section 901 provides, in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .

posal originally included as Section 1004 within the House version of Title IX, H.R. 7248, 92d Cong., 1st Sess., the Higher Education Act of 1971, which was identical to the language of Section 604 of Title VI.

The deletion of the House proposal of Section 1004 from the final version of Title IX signaled to the Court that Congress did not intend the employment restrictions upon Title VI to apply to Title IX. *See* 118 Cong. Rec. 24684 n.1 (1972) (Sen. Bayh)[6]. The Court concluded that "[i]f Congress had intended that Title IX have the same reach as Title VI . . . we assume that it would have enacted counterparts to both §601 and §604 [of Title VI]." 102 S.Ct. at 1922.

By contrast, in the 1978 Amendments to the Rehabilitation Act, Congress did enact a counterpart to Section 604 of Title VI. Section 505 of the Rehabilitation Act incorporates the "remedies, procedures and rights" of Title VI into Section 504, without excluding the express limitation contained in Section 604. Therefore, in contrast to the Court's finding in *North Haven* with respect to Title IX, the language of the Rehabilitation Act demonstrates Congress' intent to apply the entire enforcement scheme of Title VI to Section 504.

The court below rejected this straightforward interpretation of the statutory language, reasoning instead that Section 505(a)(2) of the Rehabilitation Act had limited impact because it only related to the provisions of Title VI that referred to "persons." Since only Section

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6. The court in *North Haven* also relied upon post-enactment legislative history to demonstrate that Congress considered, but did not disapprove, HEW regulations that did not contain the Section 604 limitation. 102 S.Ct. at 1923-25. Moreover, Congress did not pass later proposed amendments to Title IX that would have explicitly precluded Title IX employment discrimination actions. *Id.* at 1925. Finally, Title IX contained, in Sections 902 and 903, analogs to Section 602 and Section 603 of Title VI, which underscore Congress' deliberate deletion of an analog to Section 604. By contrast, Section 504 contains *no* independent enforcement procedures beyond those incorporated by Section 505.

603, 42 U.S.C. §2000d- 2, provides for any rights or remedies for *persons*,[7] the only Title VI "remedies, rights and procedures" extended to the Rehabilitation Act by Section 505(a)(2) consisted of a single provision, Section 603, addressing judicial review of agency action. The remaining five provisions of Title VI were inapplicable to the Rehabilitation Act. Consequently, the Court of Appeals found that Section 604 of Title VI could not limit a private action under Title VI or Section 504 because it refers to action by "any department or agency", not persons.

It is evident from the language of Title VI that the statute's enforcement scheme depends on agency action, pursuant to regulations, to effectuate the broad nondiscrimination policy established in Section 601. *See* Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO.L.J. 1 (1981). Section 602 provides administrative safeguards for recipients of federal funding prior to such agency action and Section 603 provides for judicial review of any agency determination by "any person aggrieved" by such action. In Section 604, however, Congress expressly prohibited agencies from acting, with respect to employment practices, unless "a primary objective of the Federal financial assistance is to provide employment."

This emphasis upon agency action, rather than private lawsuits, to secure compliance with Title VI explains the existence of only a single reference to "persons" in Title VI. Simply put, only agency action was circumscribed in Section 604, because only agency action was contemplated. The court assumed that because Congress did not anticipate private enforcement of Title VI, Congress could not have intended to limit such enforcement.

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7. The pertinent provisions of Title VI in effect as of the passage of the 1978 Amendments to the Rehabilitation Act are set forth in Attachment A, attached hereto.

The illogic of this analysis is apparent, for it simply does not follow that a court can impute from Congressional silence an intent to give *greater* rights to private litigants than to the agencies charged with the responsibility for interpreting and enforcing Title VI. Similarly, by opening the remedies of Title VI to "persons" aggrieved under the Rehabilitation Act, Congress did not intend to invest individuals with substantive rights broader than, and independent from, those subject to agency definition, administration and enforcement. As recently recognized by the Court:

> Since §504 was patterned after Title VI of the Civil Rights Act of 1964, it was understood that responsibility for enforcing it, insofar as it regulated private recipients of federal funds, would lie with those agencies administering the federal financial assistance programs. . . . When the Act was amended in 1978, that understanding was made explicit.

Community Television of S. Cal. v. Gottfried, 51 U.S.L.W. 4134, 4137 (U.S. Feb. 22, 1983) (No. 81-298).

The Court of Appeals' holding leads to the anomalous conclusion that the more detailed the rights and procedures given to a protected group by Congress, the greater the restrictions upon those rights. Thus, by providing specific protection under Sections 501 and 503,[8] Congress provided less protection to employees under those Sections than that given to employees of federal grantees under the general language of Section 504. In addition, the court created two standards for compliance with the same provision: one applicable in an agency enforcement proceeding, and the other, in a private court action.

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8. Sections 501 and 503 of the Rehabilitation Act are set forth in Attachments B and C, respectively, attached hereto.

B. The Legislative History of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964 Demonstrates That Congress Intended to Limit Actions Alleging Employment Discrimination Under Those Acts.

A review of the pertinent legislative history of both statutes is consistent with the clear statutory language set forth above and contains no evidence that Congress intended to establish an employment discrimination remedy of the scope created by the Court of Appeals.

1. Congress intended Title VI to apply to employment discrimination only where the primary objective of federal funding was to provide employment.

The legislative history of Title VI demonstrates that Congress refrained from intensively regulating federal grantees to minimize utilization of the ultimate funding termination sanction, particularly in cases where such decisions were unrelated to the purpose of the federal funds. Representative Celler emphasized the limited nature of Title VI:

> The title will not punish innocent beneficiaries of Federal aid for wrongs committed by others. . . . As to each assisted program or activity, title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect to whom the principle declared in Title VI would apply.

110 Cong. Rec. 1520-21 (1964) (Rep. Celler). Thus, Title VI would be enforced only to ensure protection of the specific participants and beneficiaries for whom the federal funds were intended.

In response to an inquiry as to whether Section 601 covered employment discrimination, Representative Rodino, ranking majority member of the Committee on the Judiciary, reiterated the limitation noted by Repre-

sentative Celler: "I believe it would be necessary to look at each program to determine what the purpose of that program is in order that we might find out whether it is covered." 110 Cong. Rec. 2484 (1964) (Rep. Rodino).

The legislative history of Title VI is replete with such references to an explicit Congressional understanding that the employment practices of a recipient of federal funds would not be affected unless the purpose of the funds was to provide employment. Thus, Representative Celler discussed this specific limitation in the context of the Agricultural Production Act, 7 U.S.C. §§602-673, when he stated:

> [T]he purpose of acreage allotments under the Agricultural Production Act is to assist farmers by stabilizing production and prices; it is not basically concerned with farm employment. As applied to this program, Title VI would preclude discrimination in connection with the eligibility of farmers for allotment payments—but would not require action to end discriminatory employment practices by farmers receiving allotments.

110 Cong. Rec. 1521 (1964) (Rep. Celler). *See also* 110 Cong. Rec. 7060 (1964). (Sen. Pastore); 110 Cong. Rec. 10076 (Attorney General Kennedy).

In order to respond to the concerns of Congressional critics, Senator Humphrey introduced Section 604, to expressly preclude agency action under Title VI with respect to employment practices except where a primary objective of the Federal financial assistance was to provide employment. At that time, Senator Humphrey noted "[t]his provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title." 110 Cong. Rec. 12720 (1964) (Sen. Humphrey).

The court below assumed, without citing any legislative authority, that Section 604 was included within Title VI primarily to avoid a duplication of federal agency

effort, in light of the availability of Title VII for relief from employment discrimination. 687 F.2d at 769-70 (Jt. App. at A-38 through A-40). The Congressional debates on Title VI contain no mention of this rationale as the basis for Section 604.[9] Section 604 was enacted to prevent sanctions against employment practices of recipients of federal funds where employees were not the intended beneficiaries of such monies supplied for non-employment related purposes. As noted by the United States Court of Appeals for the Fifth Circuit:

> Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged; Congress was interested in a general requirement essential to success of the program as a whole.

United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 883 (*1966*), *cert. denied*, 389 U.S. 840 (1967).

To effectuate the clearly articulated Congressional intent to utilize agency enforcement as the means to ensure compliance with Title VI, the express restrictions of Section 604 must also apply to any private actions to enforce individual rights directly under Section 601. If such were not the case, the detailed procedural safeguards established by Congress in Sections 602 and 603 would be eviscerated by individual actions. Indeed, because the administrative complaint procedures are limited by Section 604, individuals claiming employment discrimination under Section 601 not only *could* evade the regulations established for federal agencies under Section 602, but they would be *required* to do so. Thus, merely by accepting a federal grant, employers would be subject to judicial intervention in discrimination disputes outside the statutory scheme and the scope

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9. Public employees were not subject to Title VII until 1972. Pub. L. 92-261 (March 24, 1972). Thus, Title VII was not available to persons with employment claims against a substantial portion of all federal grantees.

of administrative regulation.[10] *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Association Against Discrimination In Employment, Inc. v. Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

In an analogous case, the Court recently recognized that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Similarly, by enacting Title VI, Congress intended only to prevent the utilization of federal funds in a discriminatory manner. At the same time, Congress did not intend to attach disproportionate conditions upon the receipt of federal assistance, nor did it intend to punish innocent beneficiaries through wholesale funding sanctions.

When Congress in 1973 decided to deal with the problem of handicap discrimination, it deliberately chose the pattern of Title VI, rather than the more extensive and employment-related Title VII. Accordingly, the limitations described above must also be applied to actions under the Rehabilitation Act.

2. Congress intended the limitations of Title VI to apply to actions under Section 504 of the Rehabilitation Act.

In the Rehabilitation Act of 1973, Congress enacted Section 504 as a broadly worded prohibition of discrimination on the basis of handicap by recipients of Federal financial assistance. Section 504 contained no enforcement provisions analogous to Sections 602 and 603 of Title VI and Sections 902 and 903 of Title IX. The Court of Appeals assumed that the broad language of Section 504 must be construed to provide a remedy against all

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10. To the extent that such private actions would not be limited to individual relief, the absence of procedural safeguards grows even more acute. Courts have long recognized the private right to seek funding terminations under Title VI. *See Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Hardy v. Leonard*, 377 F. Supp. 831 (N.D. Cal. 1974).

discrimination, including employment discrimination, without regard to the purpose of the federal funding. The 1973 legislative history of Section 504 demonstrates, however, that Congress intended that provision to be a statement of policy — not the starting point for the creation of entirely new substantive rights that exceed those established by Title VI.

The Rehabilitation Act was initially submitted as H.R. 8395 and its counterpart in the Senate as S.3987 to amend the Vocational Rehabilitation Act, which was to expire on June 30, 1972. As noted by the Senate Report on the Rehabilitation Act, the federal vocational rehabilitation program, offering training, counselling and placement services for the physically handicapped, was first enacted as the Smith-Fess Act in 1920, Pub. L. 66-836, and subsequently expanded to cover the mentally disabled and to provide restorative services, grant-in-aid programs, and to establish the Vocational Rehabilitation Administration to oversee the programs.[11] Congress determined in 1972 that the Act required more comprehensive provisions in order to aid the most severely disabled. S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted* in 118 Cong. Rec. 32281, 32283 (1972).

Section 504 was not included in the original House version, H.R. Conf. Rep. No. 1581, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 35141, 35163 (1972), but was added by the Senate bill to "proclaim a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 1135, 92 Cong., 2d Sess. *reprinted in* 118 Cong. Rec. 32281, 32294 (1972). This description of Section 504 was also included in the final Senate report, S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News at 2123. Indeed, Section 504 was included within Title V of the Act — "Miscellaneous Provisions."

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11. S. Rep. No. 318, 93d Cong., 1st Sess. n.8, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2082-83.

By contrast, Congress specifically addressed the employment rights of federal agency and federal contractor employees. With regard to employees of federal agencies, Congress established in Section 501 of the Act, 29 U.S.C. §791, a Federal Interagency Committee on Handicapped Employees "to insure that there is no discrimination in employment of handicapped individuals by and within the agencies of the federal government in hiring, placement or advancement." S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted* in 118 Cong. Rec. 32281, 32293 (1972). Section 503 of the Act, 29 U.S.C. §793, mandated affirmative action in employment of the handicapped persons by federal contractors with federal contracts in excess of $2,500, and provided an administrative mechanism to process complaints of handicapped individuals.[12]

Thus, the legislative history of the 1973 Act provides no evidence that Congress intended to establish any remedy against employment discrimination by federal grantees.[13] *Compare Pennhurst State School and Hospital v. Halderman, supra* ("Bill of Rights" in federal

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12. The court below identified several comments by Senators referring to employment discrimination as evidence that Section 504 was intended to provide protection against such discrimination. It is far more likely that these remarks were stated in the context of employment discrimination covered by Sections 501 and 503. Thus, for example, Senator Stafford's concern with "unfounded discrimination in employment" mentioned by the court below at 687 F.2d at 773n. 3 (Jt.App. at A-43 n.3), was stated in connection with his opposition to an amendment offered by Senator Taft to delete provisions establishing four new subagencies within HEW, none of which would have had any authority over Section 504 complaints. 119 Cong. Rec. 5893 (1973).

13. The broad comments of Senator Javits, emphasizing "opportunities for employment of the handicapped" 119 Cong. Rec. 5887 (1973), and Senator Cranston, seeking "accomplishments in employment for handicapped individuals." 119 Cong. Rec. 5882 (1973), referred to by the court below as 687 F.2d at 773 (Jt.App. at A-44 through A-45) can be viewed as expressions of the overall purposes of the Act, which certainly included provisions dealing with training, grants and affirmative action in employment.

legislation was statement of policy, rather than condition on receipt of federal funds). As noted by the Court:

> Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goal, serve as a nudge in the preferred directions.

Rosado v. Wyman, 397 U.S. 397, 413 (1970), *as quoted in Pennhurst*, 451 U.S. at 19.

Congressional intent regarding the scope of Section 504 evolved the following year when Congress passed the Rehabilitation Act Amendments of 1974 Pub. L. 93-516, 88 Stat. 1619, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373. Senate Report No. 1297 accompanying the Amendments explicitly noted that Section 504 was to be interpreted and enforced *in pari materia* with Title VI:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 20 U.S.C. 1681 (relating to sex). . . .
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations . . . attempts to bring non-complying recipients into voluntary compliance . . . and the imposition of sanctions. . . . This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process, (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

Id., 1974 U.S. Code Cong. & Ad. News at 6390-91. *See also* 120 Cong. Rec. 30551 (1974) (Sen. Stafford).

In 1978, Congress confirmed its intent to require parallel enforcement of Title VI and Section 504 by enacting the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub.L. 95-602, 92 Stat. 2955, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, as amendments to the Rehabilitation Act. This Act included a new Section 505, which provided that the enforcement procedures set forth in Title VI would apply to the Rehabilitation Act.

When the 1978 Amendments were considered, administrative enforcement of Title VI had been limited by the requirements of Section 604, 45 C.F.R. §80.3(c). In addition, at least one judicial interpretation of Title VI as of 1978 construed Section 604 to apply to private actions under Title VI. *Feliciano v. Rommey*, 363 F. Supp. 656 (S.D.N.Y. 1973). *See also United States v. Jefferson Cty Bd of Educ.*, 372 F.2d at 883. By contrast, no court had permitted a private employment discrimination action to go forward under Title VI where the purpose of the funding was unrelated to employment.[14]

The Court must presume that Congress in 1978 was aware of the judicial interpretation of Title VI, as well as the regulations promulgated by the federal agencies responsible for enforcing the statute. As noted by the Court, "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978). Accordingly, by incorporating the "remedies, procedures and

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14. Several private Title VI employment discrimination cases against police departments were considered prior to 1978 without discussion of Section 604, presumably because the employment purpose of the federal funding was conceded. *Afro-American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974); *Ortiz v. Bach*, 14 Fair Empl. Prac. Cas. (BNA) 1019 (D. Col. 1977); *Hardy v. Leonard*, 377 F. Supp. 831 (N.D. Cal. 1974).

rights" set forth in Title VI into Section 504, and by repeatedly evincing an intent to require identical enforcement of the two statutes. Congress adopted the same restrictions applicable to Title VI, including Section 604, for Section 504.

The application of Section 604 to both administrative and private actions under Section 504 of the Rehabilitation Act promotes the same policy considerations that motivated Congress with respect to Title VI. As a funding statute primarily designed to implement and assist programs for the training, care and rehabilitation of the handicapped, any sanctions designed to withhold those funds as an incentive to prevent discriminatory practices would have to be carefully tailored to avoid harming innocent beneficiaries of federal funds. This potential conflict in legislative goals is brought into sharp relief when the alleged discrimination does not affect the objectives of the federal assistance. As the Court observed in *Pennhurst*, if Congress intended to condition all federal grants, regardless of the purpose or scope of such assistance, upon certain obligations with respect to decisions unrelated to the federal grants, Congress would have done so unambiguously. Accordingly, agencies charged with the responsibility of enforcing both Section 504 and Title VI should operate under the same Section 604 limitation for both statutes. If such were not the case, the "administrative consistency" envisioned by the 1974 Senate Report would never be attained, because Section 504 would be enforced in a far broader manner than Title VI.

Congress considered, but never enacted, several proposals to amend Title VII to include handicap discrimination.[15] Congress could have explicitly deleted Section 604 from the "remedies, procedures and rights"

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15. Senators Percy and Humphrey introduced S. 3458 on April 7, 1972, to amend Title VII to make discrimination on the basis of handicap an unlawful employment practice. 118 Cong. Rec. 11788 (1972). Subsequently, Senator Williams introduced a similar bill, S. 446, on February 22, 1979. *See* S. Rep. No. 316, 96th Cong., 2d Sess. (1979).

incorporated into Section 504 by Section 505(a) of the 1978 Amendments. These negative implications of Congressional intent have been ignored by the court below, in refusing to apply Section 604 to the instant matter. *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

The court below, discovering no direct evidence of intent, relied upon a Senate Report accompanying the original Senate bill of the 1978 Amendments, to find that Congress intended Section 504 to encompass employment discrimination claims against all federal grantees. 687 F.2d at 774 (Jt. App. at A-46) This Report stated:

> It is the Committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). The court below construed these statements to indicate an approval of the HEW regulations implementing Section 504 which were promulgated prior to the 1978 Amendments.[16] These regulations, which interpreted Section 504 to be "consistent with the . . . regulations implementing Title IX . . . and . . . Section 503 . . ." 42 Fed. Reg. 22688, do not contain any requirement that the primary purpose of the Federal financial assistance be to

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16. Although S. Rep. No. 1297 suggested that the HEW should promulgate regulations coordinating the enforcement of Section 504 among federal agencies, 1974 U.S. Code Cong. & Ad. News at 6391, HEW refused to do so in light of the lack of express statutory authority. HEW finally submitted draft and proposed regulations, 41 Fed. Reg. 20296 (May 17, 1976), 41 Fed. Reg. 29548 (July 16, 1976), in response to Executive Order No. 11914 (April 28, 1976), 41 Fed. Reg. 17871 (April 29, 1976), which directed HEW to do so. The final Section 504 regulations, 42 Fed. Reg. 22676 (May 4, 1977), *codified at* 45 C.F.R. Pt. 84, were promulgated only after a court order was obtained in *Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976).

provide employment as a condition to the imposition of sanctions under Section 504, in direct contrast to Title VI, and the regulations promulgated thereunder. *Compare* 45 C.F.R. §84.11(a)(1) (Section 504) *with* 45 C.F.R. §80.3(c). (Title VI).

Clearly, the Senate Committee believed that enforcement of Section 504 should follow enforcement of Title VI, not Title IX, as stated by HEW. The Committee apparently overlooked the differences between the HEW regulations promulgated under Title VI and Section 504, for, with respect to employment practices, the two sets of regulations did *not* "conform", nor did the new 504 regulations "codify existing practice." [17]

Congress' overarching intention was that Section 504 be enforced in the same manner as Title VI. To the extent the HEW regulations adopted a different enforcement policy, they are inconsistent with legislative intent and, by "go[ing] beyond the carefully worded *nondiscrimination* provision of §504, exceed the powers of the Secretary under §504. The Secretary has no authority to rewrite the statutory scheme by means of regulations." *University of Texas v. Camenisch*, 451 U.S. 390, 399 (1981) (Burger,C.J., concurring) (emphasis in original).

The interpretation of Section 504 in the HEW regulations, and adopted in the regulations promulgated by

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17. The Section 504 regulations did not codify existing practice under Title VI, for the regulations under that Title did not provide for relief from employment discrimination unless the condition set forth in Section 604 was satisfied. The United States District Court for the Eastern District of Pennsylvania did utilize the Section 504 regulations, prior to the 1978 Amendments, to permit private actions alleging handicap discrimination without reviewing the purpose of the federal funding. *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978). Neither case considered the effect of Section 604 upon Section 504, for the Rehabilitation Act did not require it. Interestingly, in *Davis*, the federal assistance was received under the Comprehensive Employment and Training Act, 29 U.S.C. §§841-991, whose purpose was to provide employment.

other agencies under HEW guidelines[18] is not entitled to deference because it "rewrite[s] the statutory scheme." Indeed, the Court noted in *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979), that these regulations are entitled to little weight.

This deference is further diminished by the failure of either the Department of Health and Human Services or the Department of Justice[19] to amend the guidelines for federal agency enforcement of Section 504 to reflect the 1978 Amendments. Even assuming *arguendo* that private actions would not be necessarily limited by Section 604, certainly that provision would apply to agency enforcement under its explicit terms. Yet the HHS regulations, followed by all other executive agencies, authorize agency action in response to employment discrimination against the handicapped, regardless of the purpose of the federal funding. 45 C.F.R. §84.11.

The Court of Appeals also cited the post-enactment pronouncements of the Senate Committee on Labor and Human Resources in 1979, six years after the original passage of Section 504. The committee report, S. Rep. No. 316, 96th Cong., 1st Sess. (1979), accompanied an unsuccessful bill to amend Title VII to include handicapped employees. This report, disapproving *Trageser*,

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18. Subsequent to the publication of guidelines for Section 504 regulations by HEW, 43 Fed. Reg. 2132 (January 13, 1978), *codified* at 45 C.F.R. Pt. 85, each federal agency issued regulations for the enforcement of Section 504 with respect to their assistance programs. The Department of Transportation, from whom Conrail receives its federal funds, adopted such regulations on May 31, 1979, 44 Fed. Reg. 31468, *codified at* 49 C.F.R. Pt. 27. In 49 C.F.R. §27.31, DOT accepted the HEW interpretation of Section 504 as set forth above.

19. By Executive Order No. 12250 (November 2, 1980), 45 Fed. Reg. 72995 (November 4, 1980), President Carter transferred authority to coordinate agency implementation of Section 504, Title VI and Title IX to the Office of the Attorney-General. The Department of Justice thereafter simply adopted the HEW implementation guidelines for Section 504, by transferring these guidelines from 45 C.F.R. Pt. 85 to 28 C.F.R. Pt. 41. 46 Fed. Reg. 40686 (August 11, 1981).

should be accorded little weight for "[a] mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty" than subsequent legislation declaring the intent of an earlier statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). *See also Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).[20]

"Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981). The clear language of Section 505 demonstrates Congressional intent to include all of the Title VI "remedies, procedures and rights", including Section 604, into Section 504. Any other construction would mean such "remedies" would only include a single provision, Section 603. Moreover, the interpretation of the court below ineluctably leads to the conclusions that (1) Congress intended to provide broader rights for employees of federal grantees than for employees of federal agencies and contractors, despite specific language to the contrary in the Rehabilitation Act, (2) that Congress intended employees of federal grantees to have greater enforcement rights than federal agencies responsible for the implementation of Section 504, and (3) that Congress intended to permit employees of federal grantees to sue in federal court and ignore administrative procedures due to the lack of federal agency authority to act.

Such a broad, far-ranging right, in derogation of the limited purposes of Section 504, should not be assumed merely from a single nondiscrimination provision. The Court has recognized that "we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. '[I]t is

20. In any event, if Congress had intended the result envisioned by the Senate Committee, it could have amended Section 504 to expressly exclude Section 604 from the operation of its enforcement provisions in order to deal with *Trageser* and subsequent court decisions so limiting Section 504.

not for us to fill any *hiatus* Congress has left in this area.' " *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979), *quoting Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). The court below created a remedy that Congress did not provide. Therefore, the decision of the court below should be reversed.

II. THE FAILURE OF THE THIRD CIRCUIT TO REQUIRE A NEXUS BETWEEN A SPECIFIC PROGRAM SUPPORTED BY FEDERAL FINANCIAL ASSISTANCE AND THE DENIAL OF EMPLOYMENT VIOLATED THE "PROGRAM-SPECIFIC" NATURE OF SECTION 504

The Court of Appeals did not require LeStrange to show any connection between his claim and a particular program supported by such funding. By thus ignoring the "program-specific" mandate of Section 504, the court misconstrued the Rehabilitation Act, and misapplied relevant portions of the Court's decision in *North Haven*, 102 S.Ct. at 1926-28. For those reasons, the decision below should be reversed.

A. The Language of the Rehabilitation Act is Program-Specific

Under Section 504, a qualified handicapped individual may not be discriminated against "*under any program or activity receiving Federal financial assistance. . . .*" 29 U.S.C. §794 (emphasis added). By its very terms, Section 504 operates only to prohibit discriminatory practices with respect to a particular federally funded program.

The "program-specific" language of Section 504 is identical to that contained in Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Moreover, one of the "remedies, rights and procedures" set forth in Title VI incorporated into the Rehabilitaton Act is Section 602 which provides, in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termi-

> nation of or refusal to grant or to continue assistance *under such program or activity* . . . but such termination or refusal . . . *shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been found*. . . .

42 U.S.C. §2000d-1 (emphasis added).

These program-specific restrictions are identical to those in Sections 901 and 902 of the Education Amendments of 1972, which were examined by the Court in *North Haven*, 102 S.Ct. at 1926-28. Indeed, in finding that the provisions of Title IX were program-specific, the Court relied in part upon the similarity of Titles VI and IX, *North Haven*, 102 S.Ct. at 1927. While explicitly refraining from defining "program", *id.* at 1926, the Court nevertheless implied that Title IX requirements would be satisfied in this respect if "the complaining employees' salaries were . . . funded by federal money, . . . the employees . . . work in an education program that received federal assistance, or . . . the discrimination they allegedly suffered . . . affect[ed] a federally funded program." *Id.* at 1927. Thus, there must be some nexus between the alleged discriminatory activity and a specific program receiving federal funding. The Court remanded *North Haven* because "the Court of Appeals paid insufficient attention to the 'program-specific' nature of the statute." *Id.* at 1926.

Like the Second Circuit in *North Haven*, the Court of Appeals "paid insufficient attention to the 'program-specific' nature of the statute" *Id.* at 1926. The court made no findings that the position for which LeStrange applied was funded with federal money or that LeStrange sought employment into a federally funded program. In fact, there is no indication in the decision that the court even considered whether a connection existed between a specific Conrail program supported by Federal financial assistance and the allegedly discriminatory denial of employment to LeStrange. For this reason, this matter should be reversed and remanded to the Third Circuit.

B. The Third Circuit's Adoption Of An "Institutional" Approach To Section 504 Cannot Be Reconciled With The Program-Specific Nature Of The Statute.

The opinion of the Court of Appeals offers no explanation for its failure to consider whether LeStrange was discriminated against in the context of a specific federally funded program. Judge Adams' concurring opinion suggests, however, that the result was compelled, in part, by the Third Circuit's recent decision in *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983)(No. 82-792), where:

> [T]his Court concluded that an entire educational institution is brought within the definition of 'program', and therefore subject to regulation under Title IX, if it receives any federal aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution.

687 F.2d at 777 (Jt.App. at A-52). The assumption implicit in the finding of the court below, in light of Judge Adams' concurrence, is that Conrail's receipt of non-restricted federal funds under §216 of the 3R Act, 45 U.S.C. §726, *see* Affidavit of Richard Semerad (Jt. App. at A-15), subjected Conrail, as an entire company, to regulation under Section 504, because the funds received were not earmarked for a particular program or activity.[21] This implicit assumption is contrary to the "program-specific" language of Section 504, and, by implication, Title VI, as well as the legislative history of those statutes, and the Court's decision in *North Haven*.

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21. The district court expressly found that the federal funds Conrail received for reimbursement for employee protective benefits under Title V of the 3R Act, 45 U.S.C. §§771-780, were unrelated to any allegations of discrimination by LeStrange. The Third Circuit did not criticize, or even discuss this finding. Because the district court did not rule on the relevance of general funds received under §216 of the 3R Act, it is logical to assume that the Third Circuit decision was founded upon this monetary assistance.

1. The legislative history of Section 504 evidences Congressional intent to utilize a "programmatic", rather than "institutional" approach.

Congress intended Section 504 to be interpreted and enforced only in the context of a specific federally funded program in order to avoid the expenditure of federal monies in a discriminatory fashion.

In both the initial Senate report describing the proposed rehabilitation legislation, S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 32281, 32294 (1972), and the final Senate report accompanying the Rehabilitation Act of 1973, S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2123, Section 504 was listed under the heading of "nondiscrimination *under federal grants*." The final Senate report also noted that "[t]he Committee bill . . . prohibits discrimination against qualified handicapped individuals under Federal grants." *Id.*, S. Rep. No. 318, at 18.

This "program specific" focus was underscored by the Senate Report accompanying the 1974 Amendments to the Rehabilitation Act, in which the Senate committee described the purpose of Section 504 "to prevent discrimination against all handicapped individuals . . . *in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided programs.*" S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388. This statement clearly indicates a Congressional intent to combat discrimination occurring in the context of specific federally funded activities.[22]

It is well established that Title VI is program-specific. *See North Haven*, 102 S.Ct. at 1926-28; 110 Cong. Rec. 1542, 5253, 5422 (1964). In utilizing language for Section 504 that tracked Section 601 and in

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22. *See also* S. Rep. No. 318, 93rd Cong., 1st Sess. 70, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2143.; S. Rep. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390.

expressly adopting the "remedies, rights and procedures" of Title VI into the Rehabilitation Act, Congress intended that Section 504 contain the program-specific orientation of Title VI. The United States Court of Appeals for the Seventh Circuit reached this conclusion, in affirming the dismissal of an employment discrimination claim on the basis of handicap in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980). In that case, the court reviewed the language and legislative history of Section 504 and found that:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. . . . To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

Id. at 1232.

The court rejected the plaintiff's claim "since plaintiff has not demonstrated any nexus between his discharge and the federal assistance." *Id. See also Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981).

These decisions, and the legislative history and statutory language of Section 504 upon which they are based, cannot be reconciled with the Third Circuit's assumption, without discussion, that the receipt of non-restricted federal funds automatically subjected Conrail in its entirety to scrutiny under Section 504. The court failed to find that federal funds were actually used in connection with a program or activity under which LeStrange was allegedly subjected to discrimination.

2. The "institutional" approach implicitly applied by the court below under *Grove City* is inconsistent with the "program-specific" nature of Section 504.

The implicit finding of the Court of Appeals that Conrail was subject to the dictates of Section 504 with respect to all of its operations because it received

nonrestricted federal funds is based upon *Grove City*, 687 F.2d at 700-01. The Third Circuit stated that the Court in *North Haven* had "implicitly adopt[ed] an institutional approach to the concept of program." *Id.* at 697.

Under this decision, any institution that receives nonrestricted Federal financial assistance will be subject in its entirety to the dictates of Title IX, and inferentially, Title VI and Section 504. Whether federal funds are actually utilized in connection with the program or activity alleged to be discriminatory would therefore be irrelevant. Such a finding is inconsistent with the well-settled judicial interpretation of these statutes, and will vastly broaden the scope of these statutes, far beyond that intended by Congress.

The reasoning of the Third Circuit in *Grove City* has been rejected by every Court of Appeals that has considered the issue. *See, e.g., Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982). Moreover, the Department of Justice, the agency responsible for coordinating all federal agency enforcement of Title VI, Title IX and Section 504 has recently stated its disagreement with the Third Circuit's analysis in *Grove City*. In electing not to appeal a federal court decision holding that the mere receipt of nonrestricted federal funds was insufficient to sustain a Title IX claim, *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), the DOJ stated:

> In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found *[Univ. of Richmond]* to be both analytically and legally sound. Its conclusion that only those university programs and activities shown to be recipients of federal funds are within the reach of Title IX is fully consistent with the better reasoned judicial precedents in this area. . . .

Letter of Assistant Attorney General Reynolds to Clarence Pendleton, Jr., September 16, 1982 *as reprinted in*

Appendix to Petition for Certiorari in *Grove City v. Bell*, No. 82-792 (Nov. 9, 1982) (A. 135-36). Mr. Reynolds explicitly stated that the Department's position was that Congress had not intended so expansive a definition of "program or activity" as that found by the Third Circuit in *Grove City*. *Id.*

In light of the clear "program-specific" language and legislative history of Section 504, Conrail respectfully submits that the same standard should apply herein as has been consistently applied under Title VI and Title IX. In order to fall within the protection of Section 504, LeStrange must demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance. *Simpson v. Reynolds Metals Co.*, 629 F.2d at 1235-37. Where federal funding is not restricted to particular programs, a federal court or agency must examine whether in fact the assistance is utilized in the particular program or activity in which the allegedly discriminatory actions are claimed to have occurred. In this manner, Congress' intent to avoid the expenditure of federal monies to support programs that operate in a discriminatory fashion, may be effectuated. 110 Cong. Rec. 1622-23 (1964) (Rep. Celler); 110 Cong. Rec. 12676 (1964) (Sen. Allott). To ignore this requirement would be to subject an entire institution to liability, a result Congress rejected during legislative consideration of both the Rehabilitation Act and Title VI. *Cf.* 110 Cong. Rec. 5253 (1964) (Sen. Humphrey); 110 Cong. Rec. 7059 (1964) (Sen. Pastore) (Title VI). Because this determination was never made by the court below, Conrail respectfully requests that the decision of the Third Circuit be reversed and remanded.

III. RESPONDENT LESTRANGE DOES NOT HAVE A PRIVATE CAUSE OF ACTION UNDER SECTION 504.

The third question on *certiorari* before the Court is whether a private cause of action exists under Section 504 of the Rehabilitation Act. As stated in the Petition,

this issue was not argued below because it was well-settled in the Third Circuit. Petition at 21. *See NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979). However, this Court has previously reserved decision on the issue, *Southeastern Community College v. Davis*, 442 U.S. at 404 n.5, and it is "squarely presented" here and ripe for resolution. *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

This case also presents a subsidiary question of whether a private cause of action for monetary relief exists under Section 504, Rule 21.1(a). Conrail submits that even if a private cause of action can be implied under Section 504, it should be limited to injunctive relief.

A. In The Present Procedural Context Respondent LeStrange Can Seek Only Monetary Relief.

Respondent LeStrange brought this private action under Section 504 seeking both injunctive and monetary relief including reinstatement and backpay. (Jt. App. at A-7). On March 14, 1983, counsel for Respondent informed the Court that Thomas LeStrange died on September 22, 1982, and petitioned for substitution of the administratrix of the estate as a party. Motion For Substitution of Parties Suggesting Death of the Respondent. On April 18, the Court entered an Order substituting Lee Ann LeStrange Darrone as Respondent. Thomas LeStrange's untimely death obviously moots his request for the injunctive relief of reinstatement. *De Funis v. Odegaard*, 416 U.S. 312, 317 (1974); *Hoffman v. Ohio Youth Comm'n*, 13 Fair Empl. Prac. Cas. (BNA) 30 (N.D. Ohio 1975), *aff'd mem.*, 547 F.2d 1167 (6th Cir. 1977). Nonetheless, counsel for Respondent has expressed the intent of the estate to pursue monetary relief of backpay and compensation for medical expenses. Motion for Substitution. ¶4.[23]

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23. Conrail concedes that any private cause of action for monetary relief under Section 504 survives Thomas LeStrange's death. *See Carlson v. Green, supra*. Alternatively, if the Court were to rely upon state survivorship law, Pennsylvania law would permit LeStrange's damage claims to survive. *See* 20 PA. CONS. STAT. ANN.

Because monetary relief is the only remedy available to Respondent, and the only remedy sought, this action is moot unless Section 504 provides for a private cause of action for monetary relief. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 580-81 (1979); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460, 462 (S.D.Tex. 1982); *Patton v. Dumpson*, 498 F. Supp. 933, 936 (S.D.N.Y. 1980). If the Court should hold that Section 504 does not provide a cause of action for monetary relief, the Court need not reach the broader issue of whether a private cause of action for injunctive relief is available under the provision. *See Guardians Ass'n of N. Y. C. Police Dept. v. Civil Serv. Comm'n*, 633 F.2d 232, 254-63 (2d Cir. 1980) (Meskill, J., concurring), *cert. granted*, 454 U.S. 1140 (1982). In that event, it should find this case moot, vacate the Third Circuit's decision, and remand with a direction to dismiss. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

B. There Is No Private Cause Of Action Under Section 504 Of The Rehabilitation Act For Damages Or Injunctive Relief.

There can be no contention that Section 504 expressly provides a private cause of action because the statute makes no mention of a private cause of action. *See, e.g.*, 45 C.F.R. Part 84, Appendix A, p. 293, no. 8 (1982) (HHS regulations declining to incorporate provision granting Section 504 private cause of action, as the conferral of "such a right is beyond the authority of the executive branch of Government."); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284 (7th Cir. 1977); *Da-*

NOTE—Continued

§3371 (Purdon 1972); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 613-17 (E.D. Pa.), *aff'd mem.*, 612 F.2d 572 (3d Cir. 1979). Conrail submits however, that LeStrange's death moots any request for broader injunctive relief relating to the enforcement of Section 504 that Respondent may raise if the case is remanded. The estate's claims are derivative and thus, it lacks standing to pursue such injunctive relief. *Cf. Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

vis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978). Therefore, if a private action is found under Section 504, it is the result of judicial implication.[24]

1. There is no basis in the statute or its legislative history for an implied private cause of action to enforce Section 504.

In several recent decisions, the Court has determined whether an implied cause of action exists to enforce a federal statute. *See Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). These cases indicate that the four factor test announced in the Court's seminal decision in *Cort v. Ash*, 422 U.S. 66 (1975),[25] is a means toward a more fundamental inquiry: Did Congress intend to authorize by implication a private right of action? *See Middlesex Cty. Sewerage Auth. supra*; *Merrill Lynch Pierce Fenner & Smith, Inc. v. Curran*, 50 U.S.L.W. 4457 (U.S. May 3, 1982)(80-203). Application

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24. *See, e.g., Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Camenisch v. University of Tex.*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Jones v. MARTA, supra*; *Kling v. Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981).

25. This test is (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted, (2) whether there is any indication of legislative intent, explicit or implicit, to deny one, (3) whether an implied private remedy is consistent with the underlying purposes of the legislative scheme, and (4) whether the cause of action is one traditionally relegated to state law, in an area of concern to the states, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. at 78.

of this standard requires the Court to focus on the language and structure of the statute, as well as its legislative history. *See* J. Hurst, *Dealing with Statutes* (1982).

In the present case, the express language and nature of the Rehabilitation Act, the silent legislative history concerning the creation of a private cause of action, and the statutory and administrative enforcement schemes established by the Act, evidence that Congress did not intend the implication of a private cause of action. *See Touche Ross & Co., supra*, and *TAMA, supra*.

a. Section 505 of the Rehabilitation Act expressly identifies the remedies which are available under Section 504 of the Act, and fails to provide for a private cause of action.

The Rehabilitation Act indicates on its face that a private cause of action is not to be implied. Section 505(a)(2), which was added to the Rehabilitation Act in 1978, expressly sets forth the "remedies, procedures, and rights" which are available to aggrieved parties under Section 504, 29 U.S.C. §794a. Thus, there is no need for the Court to look past the statute and infer Congressional intent by evaluating ambiguous and inconclusive opinions held by individual Congressmen or Committees, which may not even be shared by a majority of their respective Houses. As the Court has said, "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *National RR Passenger Corp. v. National Ass'n of RR Passengers*, 414 U.S. 453, 458 (1974), *quoting Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). *See also TAMA*, 444 U.S. at 17.

Section 505 expressly establishes that a private cause of action under Section 504 can be found to exist only if a private cause of action is *set forth* in Title VI. It is instructive that Section 505(a)(2) does *not* refer to the

"remedies, procedures and rights" which are *created by* or *exist under* Title VI of the Civil Rights Act of 1964. Section 505's specific use of the phrase "set forth in title VI" limits Section 504's remedies, procedures and rights to those rights which are contained in the text of Title VI.[26]

An examination of Title VI makes it abundantly clear that a private cause of action is not a remedy which Congress *set forth* in Title VI.[27] Indeed, the courts which have recognized a private cause of action under Title VI have never done so on the basis that a provision for a private cause of action is set forth in the statute; rather, the courts which have found the existence of such an action uniformly have relied on analyses of legislative history and the purposes underlying the statute, which these courts believed supported judicial implication of a private cause of action. *See, e.g., NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Bossier Parish School Bd v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

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26. Both the common usage and legal definitions of the term "set forth" indicate that it refers to an express statement, rather than an implication. *See, e.g., American Heritage Dictionary of the English Language* (1980) (defining "set forth" as "to utter or express, as a declaration"); *Union Carbide Corp. v. Borg-Warner Corp.*, 550 F.2d 355, 366 (6th Cir. 1977) (patent declared invalid where patent application did not "set forth" the best mode contemplated for carrying out the invention; court stated, "it would seem that the [information required to be "set forth"] should be fully, clearly, and precisely disclosed if the public is to receive the benefits intended to result from the grant of the patent monopoly."); *Cohen v. United States*, 366 F.2d 363, 368 (9th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967) (attorney's written note to judge did not "set forth" a requested jury instruction where it merely stated, "I think I forgot to ask for instruction that defendant doesn't have to take stand and can't be held against him, etc." *Id.* at 368 n.2).

27. The present question under Section 504 is distinguishable from the Title IX issue presented in *Cannon v. University of Chic.*, 441 U.S. 677 (1979), because *Cannon* did not involve a statute which expressly stated the available remedies. The words "right[s]" or "remed[ies]" are not even mentioned in any of Title IX's three sections.

b. The legislative history of the Rehabilitation Act and its subsequent amendments do not evidence an intent to create a private cause of action.

The legislative history of the original Rehabilitation Act of 1973 is devoid of any references reflecting a Congressional intent to create a private cause of action under Section 504. An obvious explanation for the omission is that Congress intended Section 504 to be no more than a statement of policy. *See supra*, at pp. 14-17.[28]

The 1974 Amendments did not alter the language of Section 504, and the legislative history of these amendments, like the 1973 history, does not evidence a Congressional intent that a private cause of action be permitted under Section 504. One reference in the 1974 Amendments' legislative history, S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6391, *quoted supra* at 17, if considered out of context, suggests that the Senate Committee intended to support a private cause of action by its interpretation of a provision that had been enacted more than a year earlier.

Assuming *arguendo* that the Report's post-legislation comments are significant, the words "judicial remedy through a private action" when read in context, refer to the right to judicial review of an agency's decision to terminate or continue the federal funding of a program or activity which has allegedly engaged in discriminatory activities. *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1286. Additionally, the right to judicial review of an agency action to terminate funds is expressly conferred by Section 603 of Title VI and Section 903 of Title IX and

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28. Most of the debate in Congress was over the wide ranging programs created by the 1973 Act and the appropriations which these programs required. *Fisher v. Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 178 (1982); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1094 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 449 U.S. 889 (1980).

would be a logical facet of the enforcement scheme suggested by the Report.[29]

In 1978, Congress amended the Rehabilitation Act of 1973 to include Section 505, 29 U.S.C. §794a, which made available the remedies, procedures and rights set forth in Title VI to persons aggrieved under Section 504. Congress thereby expressly established a detailed enforcement procedure and superseded whatever implied enforcement rights previously existed.

Despite the unambiguous language of Section 505(a)(2), several courts have relied upon isolated legislative comments to find that the provision for attorney's fees in Section 505(b)[30] supports a private cause of action under Section 504. *See Garrity v. Gallen*, 522 F. Supp. 171, 211 (D.N.H. 1981); *Fells v. Brooks*, 522 F. Supp. 30, 33 (D.D.C. 1981); *Larry P. v. Riles*, 495 F. Supp. 926, 962 n.73 (N.D. Cal. 1979).[31]

These remarks bear no relation to the legislation enacted by Congress and simply suggest that some members of Congress believed, when the 1978 Amendments were enacted, that a private cause of action *already* existed under Section 504. Nothing in the legislative his-

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29. Alternatively, the Report could have contemplated an independent right of action under 42 U.S.C. §1983. To the extent that the Report suggested a remedy that did not exist, it deserves no credence, as found by the Court in *Southeastern Community College v. Davis*, 442 U.S. at 411 n.11, with regard to the Report's reference to affirmative action obligations under Section 504.

30. Section 505(b), 29 U.S.C. §794a(b), provides that:

> In any action or proceeding to enforce or charge a violation of a provision of [the] subchapter [which includes Section 504] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

31. Examples of such comments are contained in S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978) (*quoting* testimony of Deborah Kaplan); H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7332; 124 Cong. Rec. 15,590 (1978) (Senator Cranston).

tory of the 1978 Amendments, indicates that Congress intended to *create* a private cause of action in 1978.[32] Similarly, subsequent legislative comments in 1979 are entitled to little weight.[33]

The legislative history of the Rehabilitation Act of 1973 and its 1974 and 1978 Amendments does not demonstrate a Congressional intention to create a private cause of action under Section 504. Consequently, under *National RR Passenger Corp.*, *supra*, and *TAMA*, *supra*, the language of the statute controls, and a private cause of action is not available under Section 504.

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32. Indeed, in *Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1082, the court rejected the plaintiff's argument that the 1978 attorney's fees provision created a private right of action under Section 503 of the Rehabilitation Act. After quoting the Senate and House Reports for the 1978 Amendments, the court stated:

> It may, therefore, fairly be said that the 1978 committees of both Houses assumed that a private cause of action had somehow been created in the past. The existence of such a postulate is neither logical nor legislative basis to conclude that the 1973 statute did in fact create the action; and, if the 1973 statute did not authorize the cause of action, the 1978 statute evidences no intention to create one. An assumption is not a law.

33. A report accompanying an unsuccessful legislative proposal to amend Title VII to include handicapped persons stated that it had always been the Senate Committee on Labor and Human Resources' intent that a person aggrieved under the Rehabilitation Act could proceed privately to enforce the rights created by that statute. S. Rep. No. 316, 96th Cong., 1st Sess. 12-13 (1979). In finding this expression of intent non-persuasive, the *Rogers* court said:

> A statement indicating that section 503 creates a private cause of action was made by a Senate Committee in 1979. "The Committee" in 1978 or 1979 is not the committee that recommended the legislation enacted in 1974 [sic]. Had this statement been made in the report of the committee that recommended the legislation, it would indeed be part of the statutory history. When uttered five years later it is mere commentary. Moreover, a committee is not the Congress. It cannot create a Congressional intent that did not exist, or amend a statute by a report.

611 F.2d at 1082. *Cf. Cannon*, 441 U.S. at 687 n.7 (discussion of lower court's holding that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1981, had not created a remedy under Title IX that did not previously exist).

2. An implied private remedy under Section 504 would frustrate the purposes of the Rehabilitation Act.

The detailed provisions of the voluminous Rehabilitation Act, and the precise definition of the various programs and responsibilities of the agencies assigned to administer them, were necessary to Congress' goal of a *coordinated* program. 29 U.S.C. §701. Congress has created a system of checks and balances, involving both the executive and legislative branches, to ensure that the sanctions imposed on a Section 504 violator are not left to an individual plaintiff or judge. With regard to Section 504 administration, Section 505 incorporates the remedies, procedures and rights set forth in Title VI. In turn, Section 602 of Title VI sets out detailed procedures that must be followed before a discriminatory program or activity forfeits federal assistance. *See* Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L.J. 1, 36, 38 (1981).

Subsequent to passage of the 1978 Amendments, HEW and DOJ promulgated regulations which require that each Federal department and agency empowered to extend financial assistance issue regulations to implement Section 504 within the department or agency. 28 C.F.R. Part 41 (1982). *See, supra*, at 22 n.19.

As required by 28 C.F.R. Part 41 (1982), the DOT, which is responsible for the federal funds received by Conrail, has promulgated detailed regulations for the implementation of Section 504. 49 C.F.R. Part 27 (1981). These regulations require DOT to ensure that federal grantees comply with Section 504, and authorize remedial action against grantees who have violated Section 504. 49 C.F.R. §27.11(a), (b). Additionally, the responsible official may also recommend to the DOJ that appropriate proceedings be brought to enforce Section 504 or other federal statutes, and may bring an applicable proceeding under state or local law. 49 C.F.R. §27.126. The DOJ and DOT regulations illustrate the comprehensiveness of the administrative remedies set forth in Title VI, and incorporated by Section 505.

The Court has held that it is inappropriate to judicially supplement remedies expressly provided by Congress. *TAMA*, 444 U.S. at 19. It is unlikely that Congress inadvertently failed to provide for a private cause of action under Section 504, when it explicitly adopted a comprehensive administrative enforcement scheme. *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."); *Touche Ross & Co.*, 442 U.S. at 572; *Cannon*, 441 U.S. at 742 (Powell, J., dissenting). It is not the judiciary's role to imply a remedy merely because it, or the executive branch, might believe that such a remedy is desirable.[34]

C. If A Private Cause Of Action Exists Under Section 504, It Is Limited To Injunctive Relief.

Assuming *arguendo* that Section 504 may be enforced by a private party in federal court, such a private cause of action should be limited to injunctive relief.[35] This Court has stated that "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may

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34. Nevertheless, some courts have made policy determinations that the administrative remedies under Section 504 are inadequate to protect individual rights, and therefore, a private action must be implied. *Miener v. State*, 673 F.2d 969, 978 (8th Cir.), *cert. denied*, 103 S.Ct. 215 (1982); *Patton v. Dumpson*, 498 F. Supp. at 941. *See Comment, Compensating the Handicapped: An Approach to Determining the Appropriateness of Damages for Violations of Section 504*, 1981 B.Y.U.L. Rev. 133.

35. The distinction Conrail argues here is between injunctive relief and all forms of monetary relief, whether characterized as legal "damages" or an equitable remedy. It is Petitioner's position that Congress did not intend, nor should the Court imply, any type of monetary recovery under Section 504. In *Ruth Anne M.*, 532 F.

be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979). Neither the language of Section 504 nor its legislative history provide any indication that Congress intended the anti-discrimination provision to be enforced through private lawsuits for monetary damages.

The lower federal courts which have addressed the question of the availability of monetary relief under Section 504 are divided on the issue.[36] In recognition that Section 505(a)(2) of the Rehabilitation Act incorporates

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Supp at 473, the court drew a distinction between "equitable" and "legal" relief, with only the former permitted under Section 504. Such an equitable/legal distinction would still permit certain monetary remedies, such as backpay, which is considered an equitable remedy under Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In *Guardian's Ass'n*, 633 F. 2d at 255 n.43, Judge Meskill, in his concurring opinion on Title VI, draws a distinction between "compensatory" and "noncompensatory" relief, limiting Title VI recovery to the latter. Petitioner interprets Judge Meskill's distinction as prohibiting certain compensatory injunctive relief under Title VI, as well as all monetary relief. Conrail submits that the monetary/injunctive relief distinction it presents is the most consistent with the Congressional purpose underlying Section 504.

36. A number of courts have found that although a private cause of action can be implied under Section 504, it does not encompass claims for monetary relief. *Calhoun v. Illinois State Bd of Educ.*, 550 F. Supp. 796 (N.D. Ill. 1982); *Carter v. Independent School Dist. No 6*, 550 F. Supp. 172 (W.D. Okla. 1981); *Ruth Anne M., supra.*; *Miener v. State*, 498 F. Supp. 944 (E.D. Mo. 1980), *rev'd*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S.Ct. 215 (1982); *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979). Other courts have held that Section 504 provides a private action for monetary damages. *Miener v. State*, 673 F.2d 969 (8th Cir. 1982); *Gelman v. Department of Educ.*, 544 F. Supp. 651 (D. Colo. 1982); *Gregg v. Board of Educ.*, 535 F. Supp. 1333 (E.D.N.Y. 1982); *Hutchings v. Erie City & Cty Bd of Dir.*, 516 F. Supp. 1265 (W.D. Pa. 1981); *Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980); *Poole v. South Plainfield Bd of Educ.*, 490 F. Supp. 948 (D.N.J. 1980). Other courts have simply recognized a cause of action, without deciding the monetary damages issue. *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983); *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981); *Camenisch v. Univ. of Tex*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *Davis v. Maine Endwell Cent. School Dist.*, 542 F. Supp. 1257 (N.D.N.Y. 1982); *Campbell v. Talladega Cty. Bd. of Educ.*, 518 F. Supp. 47 (N.D. Ala. 1981).

the "remedies, procedures and rights" set forth in Title VI, several courts have looked to Title VI precedent for guidance. *See, e.g., Miener*, 673 F.2d at 978 n.9; *Boxall*, 464 F. Supp. at 1112. Unfortunately, the Title VI case law is also divided on the availability of monetary relief.[37]

While there is a division of authority among the courts that have reached the question whether monetary relief is available in a private action under Section 504 or Title VI[38] it is indisputable that the overwhelming majority of private actions permitted under either statute have been limited to injunctive relief. *See Pushkin*, 658 F.2d at 1377; *Guardians Ass'n*, 633 F.2d at 256 (Meskill, J., concurring).[39]

Those courts which have held that monetary relief is available in private actions under Section 504 and Ti-

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37. A number of courts have rejected Title VI damage claims. *Sumpter v. Harper*, 683 F.2d 106 (4th Cir. 1982); *Drayden v. Needville Indep. Sch. Dist.*, 642 F.2d 129 (5th Cir. 1981); *Concerned Tenants Ass'n of Indian Trails Apts v. Indian Trails Apts.*, 496 F. Supp. 522 (N.D. Ill. 1980); *Rendon v. Utah State Dept. of Empl. Security Job Serv.*, 454 F. Supp. 534 (D. Utah 1978); several courts have found that monetary relief is available, *Guardians Ass'n*, 633 F.2d at 273-75 (Coffrin, J., opinion of the Court on Title VI issue); *Flanagan v. Georgetown Coll.*, 417 F. Supp. 377 (D.D.C. 1976); *Gilliam v. City of Omaha*, 388 F. Supp. 842 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975); and at least one court has pretermitted the issue. *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 225 n.2 (8th Cir. 1976).

38. To Respondent's knowledge, the Third Circuit has not addressed the issue of the availability of damages under either Section 504 or Title VI. *Hutchings*, 516 F. Supp. at 1268. In this case, however, it did recognize that some courts have limited private Title VI actions to those for injunctive relief. 687 F.2d at 771 n.2 (Pet. App. at A-8 n.2).

39. The issue of monetary relief has been addressed under Title IX as well. *See Lieberman v. University of Chic.*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982), holding, after *Cannon, supra*, that a private cause of action under Title IX does not encompass compensatory and punitive damages. The district court in *Cannon*, 406 F. Supp 1257, 1259 (N.D. Ill. 1979), indicated that monetary relief would be inappropriate in a private action under Title IX. Neither the Seventh Circuit nor the Court commented upon the monetary relief issue in *Cannon*.

tle VI have adopted similar rationales. Finding no express Congressional intent precluding monetary relief, the courts have invoked *Bell v. Hood*, 327 U.S. 678 (1946), as support for judicial utilization of the "full panoply of remedies," including monetary relief, to further federally created rights.[40] *Hutchings*, 516 F. Supp. at 1268. *See Miener*, 673 F.2d at 977-79; *Patton v. Dumpson*, 498 F. Supp. at 939. The decisions which reject monetary claims under Section 504 and Title VI rely instead on *TAMA*, *supra*. Following that decision, the courts engage in a more detailed examination of Congressional intent as shown by the statutory language, legislative history, and underlying statutory purpose, in order to determine whether it is appropriate to judically imply a private cause action for monetary relief. *See, e.g., Ruth Anne M.*, 532 F. Supp. at 470-73; *Guardians Ass'n*, 633 F.2d at 254-63 (Meskill, J., concurring); *Boxall*, 464 F. Supp. at 1111-12. Conrail maintains that the decisions which limit private actions under Section 504 and Title VI to injunctive relief are the better-reasoned, and should serve the Court as guidance in resolving the issue.

The statutory language of the Rehabilitation Act provides no support for a damages remedy under Section 504. The statute does not expressly provide for an action for monetary relief. *Ruth Anne M.*, 532 F. Supp. at 469. Rather, §505(a)(2) simply incorporates the "remedies, procedures and rights" set forth in Title VI. For the rea-

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40. The principle of plenary remedies of *Bell v. Hood* was developed in the constitutional, not the statutory context, and has been subsequently applied to find direct actions for damages under the Constitution. *See, e.g., Davis v. Passman, supra; Carlson v. Green, supra*. As *Davis* recognized, there is a fundamental difference between implying rights from the Constitution and from Congressional legislation: the courts traditionally have had plenary power to fashion remedies to protect constitutional rights, while statutory implication is controlled by legislative intent. 442 U.S. at 241-42. As some members of the Court have recognized, overzealous judicial implication of private remedies from federal statutes may unconstitutionally project the judiciary into legislative functions. *See, e.g., Cannon*, 441 U.S. at 742-49 (Powell, J., dissenting).

sons stated in section III(B)(2), *supra*, the Court should not find a private action for *damages* where Congress has provided an administrative procedure for remedying federal grantees' non-compliance with Section 504.

It is particularly inappropriate for a court to imply a damage remedy under Section 504 when it is apparent that Congress did not adopt more expansive remedies available to it. *TAMA*, 444 U.S. at 21. The contrast between Section 504 and Title VII is particularly instructive. With Title VII, Congress expressly authorized a backpay remedy and other "equitable relief" with a "make whole" purpose. 42 U.S.C. 2000e-5(a); *Albemarle Paper Co.*, 422 U.S. 405 (1975). Congress not only refused to include handicapped individuals under Title VII, *see*, *supra*., at 19 n. 15, it declined to authorize such remedies under Section 504. See *Ruth Anne M.*, 532 F. Supp. at 471-72. Similarly, Congress declined to adopt the approach of the Education of All Handicapped Children Act of 1973, 20 U.S.C. §1415(e)(2), which authorizes district courts to grant "such relief as the court determines is appropriate." Given the existence of specific and broader damage remedies in statutes closely related to Section 504, it is unlikely that Congress "absentmindedly forgot to mention an intended private action" for monetary relief. *TAMA*, 444 U.S. at 17. Thus the language of the Rehabilitation Act not only fails to support a private action for monetary relief, but suggests Congressional rejection of such a remedy.

As many courts have recognized, the legislative history of the Rehabilitation Act is silent concerning the availability of monetary remedies under Section 504. *Hutchings*, 516 F. Supp. at 1269; *Patton v. Dumpson*, 498 F. Supp. at 939; *Miener*, 498 F. Supp. at 948. The court in *Ruth Anne M.*, *supra*, referred to legislative history suggesting the availability of backpay in a private action under Section 504. 532 F. Supp at 472, *citing* S. Rep. No. 316, 96th Cong., 1st Sess. 12-13 (1979). This legislative statement cited is not part of the legislative history of the Rehabilitation Act, or its amendments. Rather, the statement arose in the context of a failed at-

tempt to amend Title VII to include handicapped persons. *See supra*, at 38 n.33. Such political justificatory language occurring more than 5 years after the enactment of a statute is entitled to little weight. Further, if Congress intended for backpay to be recoverable under Title VI, it could have included such a provision in the 1978 amendments to the Act, but declined to do so.[41] Thus, the statement provides slim support for a private action for damages under Section 504.

The critical aspect of the legislative history of Section 504 is the complete absence of any suggestion of a "make whole" purpose which would support a damage remedy. *Cf. Albemarle Paper Co., supra. See Guardians Ass'n*, 633 F.2d at 259. Conrail submits that if Congress had enacted Section 504 with a compensatory purpose, like Title VII, such purpose would be apparent in the statutory language and the legislative history. *See Albemarle Paper Co.*, 422 U.S. at 419-21. Simply stated, it is not. Thus, the legislative history does not support implying a private action for monetary relief under Section 504.

Most importantly, an implied private action for monetary relief under Section 504 is completely at odds with the underlying purposes of the Act. *Cf. Cannon*, 441 U.S. at 703. The purposes of Section 504, like Title VI, are to prevent the use of federal funds for discrimination, and to protect certain individuals from discriminatory practices. *See Cannon*, 441 U.S. at 704; *Guardians Ass'n*, 633 F.2d at 259; *Drayden*, 642 F.2d at 132; *Lieberman*, 660 F.2d at 1187. These purposes are protected by the administrative remedies under Section

41. It is noteworthy that no court had awarded backpay under Section 504 prior to 1979, and since then, only two courts have found such compensatory relief available. *Hutchings, supra*; *Gelman, supra*. When Congress amended Section 504 in 1978, it incorporated the remedies set forth in Title VI. At that time, only one court had suggested that compensatory backpay was available under Title VI. *Gilliam, supra*. Thus, if Congress initially intended for Section 504 to provide for backpay recovery, it was apparent by 1978 that it was not being so interpreted, and yet Congress' action does not evidence an intent to change the situation.

504, and *arguendo*, actions by "private attorneys general" for injunctive and declaratory relief. *See Rendon*, 454 F. Supp. at 536; *Boxall*, 464 F. Supp. at 1112. But a monetary remedy goes beyond any necessary protection and undermines the general purposes of the Act.

Section 504 is an integral component of a legislative exercise of the Spending Power, by which the Congress provides grants to institutions it deems needy of financial support, many which are in "acute financial distress." *Cf. Lieberman*, 660 F.2d at 1188. It is fundamentally inconsistent with the central purpose of providing financial assistance for a court to impose on grantees a significant financial risk of monetary loss for non-compliance with Section 504, especially in the absence of any Congressional support for the imposition of such liability.

Further, imposing this financial risk of liability on federal grantees is also inconsistent with the purpose of expanding opportunities for the handicapped, *see* 29 U.S.C. §701, because it creates a perverse disincentive to the acceptance of federal funds. *Ruth Anne M.*, 532 F. Supp. at 473; *Miener*, 498 F. Supp. at 948; *Guardians Ass'n*, 633 F.2d at 262; *Lieberman*, 660 F.2d at 1188. The financial risk of liability for compensatory damages to grantees under Section 504 is potentially "massive." *Ruth Anne M.*, 532 F. Supp. at 473. Once courts imply a private cause of action for monetary relief, there is no inherent limitation on such liability. The risk is at least as great as the termination of federal funds under the administrative enforcement of Section 504. Indeed, the ultimate private action liability for non-compliance with Section 504 could exceed the federal funds received. *See Miener*, 498 F.Supp. at 948; *Guardians Ass'n*, 633 F.2d at 262 n.56; *Lieberman*, 660 F.2d at 1188. The result of such "remedial overkill", *id.*, will be that potential grantees will forego federal funding to avoid excessive risk of liability. *Miener*, 498 F. Supp. at 948.

Monetary relief is fundamentally different from injunctive and declaratory remedies. Declaratory and injunctive relief, if found by the Court to be within the

contemplated legislative enforcement scheme, can further the protection of individual rights under Section 504. Conversely the consequential damages sought by plaintiffs under anti-discrimination provisions are often disguised tort suits for attenuated claims of "mental distress," *Rendon v. Utah*, *supra*, *Hutchings*, *supra*, or malpractice, *Sumpter v. Harper*, *supra*.

Courts have attempted to construct limitations on the types of monetary relief recoverable in a private action under Section 504: compensatory, but not punitive damages, *Gelman*, *supra*; "equitable relief" analogous to Title VII, but not compensatory damages, *Ruth Anne M.*, *supra*; no damages when inconsistent with the Education of All Handicapped Children Act, *Calhoun*, *supra*; no damages when calculation difficult, *Campbell*, *supra*. Yet these decisions lack a principled basis for making distinctions among types of monetary relief in the absence of legislative direction.

Given the lack of any express or implied Congressional authorization of a monetary remedy under Section 504, and the inconsistency of such relief with the purposes of the Rehabilitation Act, the Court should hold that there is no private cause of action for monetary relief under Section 504.

CONCLUSION

The decision of the Court of Appeals should be reversed. Should the Court find that Section 504 does not contain a requirement that a primary purpose of the federal financial assistance supplied Conrail be to provide employment, Conrail respectfully requests that the matter be remanded for a determination whether LeStrange has shown a nexus between the denial of employment and a specific program supported by federal funds.

Respectfully submitted,

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Attachment A

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

SECTION 601

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SECTION 602

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until

the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

SECTION 603

Any department or agency action taken pursuant to section [602] of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section [602] of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

SECTION 604

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

SECTION 605

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

ATTACHMENT B

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. §791

Employment of Handicapped Individuals

Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

(a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency,

and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

Federal agencies; affirmative action program plans

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

State agencies; rehabilitated individuals, employment

(c) The Civil Service Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State

agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

Report to Congressional committees

(d) The Civil Service Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Civil Service Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the Civil Service Commission's activities under subsections (b) and (c) of this section.

Federal work experience without pay; non-Federal status

(e) An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee, or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

Federal agency cooperation; special consideration for positions on President's Committee on Employment of Handicapped

(f)(1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

ATTACHMENT C

Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793

EMPLOYMENT UNDER FEDERAL CONTRACTS

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for

the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Administrative enforcement; complaints; investigations; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver by President; national interest special circumstances for waiver of particular agreements

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.